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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 636

ANNA MARIE MANEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court may be found at page 7 of the record.

The opinion of the Circuit Court of Appeals is reported in 21 F. (2d) 28.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on June 16, 1927. A petition for rehearing was filed and entertained, but denied on September 22, 1927. The petition for certiorari was filed in this Court on December 6, 1927.

The jurisdiction of this Court to issue the writ prayed for is conferred by the Act of February 13, 1925.

QUESTIONS PRESENTED

Three questions are presented: (1) Whether in naturalization proceedings a court may permit the certificate of arrival to be filed subsequent to the filing of the petition for naturalization, although the statute requires simultaneous filing; (2) whether naturalization procured where a certificate of arrival was not filed with the petition, but later, is illegally procured within the meaning of Section 15 of the Naturalization Act, so as to support a suit for cancellation; and (3) whether the facts that the United States appeared in the naturalization proceeding and objected to the granting of naturalization on the ground that the certificate of arrival was not filed with the petition, and the question was decided against it in the naturalization court, render the matter *res judicata*, so as to estop the United States to raise the same point in the cancellation suit.

STATUTES INVOLVED

Section 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596, 597 (U. S. C., Title 8, Sec. 380), so far as pertinent reads as follows:

> At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the

United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Section 5 of the same Act (U. S. C., Title 8, Sec. 397) reads in part as follows (p. 598):

That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf * * *

Section 15 of the Act, as amended (U. S. C., Title 8, Sec. 405), is as follows (p. 601):

That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudu-

lently or illegally procured shall have sixty days' personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such state-

ments, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

STATEMENT

This is a suit instituted by the United States June 24, 1925, in the United States District Court for the Eastern District of Wisconsin under Sec-

tion 15 of the Naturalization Act, to cancel a certificate of naturalization granted to this petitioner on February 11, 1924, in the same United States District Court. The petition for naturalization was filed November 13, 1923, but it was not accompanied by the certificate of arrival, as required by Section 4 of the Naturalization Act. The certificate was not in fact filed with the Clerk of the United States District Court until December 3, 1923. (R. 3.) The opinion of the trial court states that twenty days after the petition for naturalization was filed, and on December 3, 1923, the certificate of arrival was mailed to the clerk by the district director of naturalization. (R. 8.) The affidavit attached to the petition for cancellation in this case states that the certificate of arrival was not issued until November 24, 1923. (R. 5.) The clerk of the naturalization court must have executed the petition by filing and posting the notice and taking other steps provided by law before the certificate of arrival was filed, because the final hearing appears to have occurred on February 11, 1924, less than ninety days after December 3, 1923, and Section 6 of the Act (U. S. C., Title 8, Sec. 386) provides that no final action shall be had until at least ninety days have elapsed after filing and posting the notice of the petition. When the petition for naturalization came on for hearing, a naturalization examiner, on behalf of the United States, appeared and objected to the granting of the petition, not only because the certificate of arrival was not attached to and made a part of the petition when filed, but "because

the said certificate of arrival was not filed with" the petition. (R. 5.)

The trial court, apparently recognizing the binding effect of the statutory requirement as to the time when the certificate of arrival must be filed, undertook to cure the failure to file it in time by a *nunc pro tunc* order (R. 6), and naturalization was granted against the opposition of the United States. Thereafter the United States instituted this suit, under Section 15, to cancel the certificate, alleging not only that the certificate of arrival was not physically attached to the petition until February 11, 1924, but that "no such certificate was filed with the Clerk of said Court until the 3rd day of December, 1923." The affidavit attached to the petition in this case and made a part of it (R. 2) discloses that the question whether the failure to file the certificate in time operated to prevent naturalization was raised by the United States and decided in the naturalization proceeding. The answer of this petitioner also alleges that the point raised in the cancellation suit was raised and decided in the naturalization proceeding. (R. 6.) The District Court held that the naturalization court had power to disregard the failure to file the certificate of arrival with the petition for naturalization and to accept the later filing as sufficient, and that it was sufficient that the certificate was before the court at the time naturalization was granted. The United States appealed, and the Circuit Court of Appeals held that the failure to file the certificate with the peti-

tion made the naturalization one "illegally procured" so as to support a suit under Section 15 to cancel.

ARGUMENT

The first question presented is whether the failure to file the certificate of arrival until twenty days after the petition for naturalization was filed should have operated to defeat the petition. If that question is answered in the affirmative, the questions then arising are whether the defect was of such a nature as to make the naturalization one illegally procured within the meaning of Section 15 so as to support a suit for cancellation, and whether, even if such a suit may be maintained, the question is *res judicata* as against the United States because it appeared in the naturalization proceeding and the effect of the delay in filing the certificate of arrival was there litigated and decided against it.

(1) On the first point there should be little difficulty. Although the form of petition for naturalization which the petitioner executed showed clearly that the certificate of arrival should have been filed with it, and the omission was her fault, the case may have seemed a hard one, but that should not make bad law. If a naturalization court is to be permitted, in its discretion, to dispense with the specific requirements of the Naturalization Act because it believes that in the case before it there is no reason why they should not be dispensed with, the evils which the Naturalization Act of 1906 was intended to remedy will again arise.

That all the requirements of the Naturalization Act are to be strictly adhered to is no longer open to dispute. In *United States* v. *Ginsberg*, 243 U. S. 472, 474, 475, holding that the requirement of a hearing in open court was not complied with by a hearing in the judge's chambers even though the chambers adjoin the court room, this Court said:

> An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.
>
> * * * * *
>
> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in §15 and demand its cancellation unless issued in accordance with such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge can not supply these nor render their existence nonessential.

In *United States* v. *Ness*, 245 U. S. 319, 323, 324, a certificate of arrival was not filed either with the petition or at any subsequent time, but the very basis of the holding in that case makes it reasonably clear that this Court was of the view that the cer-

tificate of arrival must be filed as required by the statute, viz, at the time of filing the petition, and not otherwise. This Court said, in dealing with the requirement and its purposes (pp. 323, 324):

> Section 6 prohibits courts from taking final action upon any petition until 90 days after such notice has been given. That period is provided so that the examiners of the Bureau of Naturalization and others may have opportunity for adequately investigating whether reasons exist for denial of the petition. The certificate of arrival is the natural starting point for this investigation. It aids in ascertaining (a) whether the petitioner was within any of the classes of aliens who are excluded from admission by §§ 2 and 38 of the Immigration Act of February 20, 1907, 34 Stat. 898; (b) whether he is among those who are excluded from naturalization under § 7 of the Naturalization Act—for political beliefs or practices; (c) whether he is the same person whose declaration of intention to become a citizen is also attached to the petition under § 4, subdivision second; (d) whether the minimum period of five years' continuous residence prescribed by § 4, subdivision fourth, has been complied with. The certificate of arrival is in practice deemed so important that in the regulations issued by the Secretary of Labor under § 28 " for properly carrying into execution the various provisions " of the act, the clerk of court is advised that he " should not commence the exe-

cution of the petition until he has received the certificate of arrival."

Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. Section 4 declares: "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." Section 27 declares: "That substantially the following forms shall be used in the proceedings to which they relate"; and the form of petition therein prescribed recites: "Attached hereto and made a part of this petition" is "the certificate from the Department of (Commerce and) Labor required by law." Experience and investigation had taught that the widespread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of perjured testimony in cases of this character. A "uniform rule of naturalization" embodied in a simple and comprehensive code under federal supervision, was believed to be the only effective remedy for then existing abuses. And, in view of the large number of courts to which naturalization of aliens was entrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be adduced. The value of contemporary documentary evidence was

> recognized; and the certificate of arrival was, therefore, specifically included among the prerequisites to naturalization. • • •

See *In re Olsen*, 18 F. (2d) 425, 426, and *In re Liberman*, 193 Fed. 301, 302.

If the certificate is the natural starting point for an investigation not only by Government officers, but by others who may be interested, such an investigation can not be efficiently conducted where the certificate is not filed with the petition and is not on file when the notice of hearing is given and need not be filed and attached until the final hearing.

As showing how strictly other courts have enforced the various requirements of the statute, reference may be made to the following cases:

In *Ex parte Lange*, 197 Fed. 769, Lange had failed to state in his declaration of intention the name of the sovereign of which he was a subject, but the court in the naturalization hearing held it had no power to permit the omitted matter to be supplied by amendment.

A similar situation existed in *In re Stack*, 200 Fed. 330; *In re Friedl*, 202 Fed. 300; and *In re Lewkowicz*, 169 Fed. 927.

The matter is well summed up in the following excerpt from the opinion of the Circuit Court of Appeals below:

> Paragraph Second of Section 4 provides *when* the certificate shall be filed. Section 9 provides *where* the hearing shall be had. It

> does not seem that there should be any more importance attached to the "when" the petition shall be filed than the "where" the hearing is to be had. Each provision is for the purpose of preventing a possible wrong, and the fact that in neither case can it be shown that a wrong has followed the disregard of the provision is aside from the question. The stringent provisions of the act are intended to prevent in advance any recurrence of those abuses that arose before the act because of the too liberal exercise of discretion on the part of the courts administering the law. We are of opinion that there was no discretion to permit a departure from one of the simple, but important, provisions of the act, and that the naturalization certificate in this case was illegally obtained.

The integrity and effectiveness of the Act will be best served by a continuance of this Court's insistence upon a strict and rigid enforcement of its provisions.

The conclusion of the Circuit Court of Appeals that the failure to file the certificate of arrival with the petition made the granting of the petition improper appears to be sound.

(2) The next question is whether the defect in the naturalization proceeding was such as to make the naturalization one "illegally procured" within the meaning of Section 15 so as to support an independent cancellation suit.

In *United States* v. *Ness, supra,* a suit was brought under Section 15 to cancel a certificate of naturalization issued by a State court. The defect in the naturalization proceeding was the failure to file a certificate of arrival. The court held that the naturalization was illegally procured within the meaning of Section 15 and that the defense of *res judicata* based on the fact that the United States had appeared in the naturalization court and objected on the ground that the certificate had not been filed could not be sustained. The difference between that case and this is that here the certificate of arrival was filed before the hearing, while in the *Ness case* it was not filed at all, but the reasoning of the Court in the *Ness case* leads to the conclusion that a certificate of arrival filed for the first time at the hearing, or filed between the date of the filing of the petition and the date of hearing, presents the same objections as if not filed at all. This is disclosed by the reasons assigned by the Court for requiring the certificate to be filed.

In re *Liberman, supra,* holds that if the certificate is not filed when the petition is filed, the proceeding is a nullity and the applicant must proceed anew by filing a new petition. See also *Ex Parte Eberhardt*, 270 Fed. 334. As to what constitutes illegal procurement, see also *United States* v. *Ginsberg*, 243 U. S. 472. There is difference of opinion as to what is meant by those words, but

unless the *Ness case* may be distinguished from this because of the differences above stated, that decision disposes of this case.

The decisions of the lower Federal courts as to what is meant by the words "illegally procured" in Section 15 are collected in a note to Section 405 of Title 8, United States Code Annotated, published by the *West Publishing Co.* and the *Edward Thompson Co.*

(3) The defense of *res judicata* was properly raised in the pleadings in this case. The facts on which it is based appear in the petition for cancellation and the defense is set up in the answer. Some uncertainty now exists as to the extent to which judgments in naturalization proceedings estop the United States to litigate in suits under Section 15 questions raised by it and decided against it in the naturalization proceedings.

In *United States* v. *Pandit*, 15 F. (2d) 285, suit was brought under Section 15 to cancel a naturalization certificate granted a Hindu, it having been held by this Court that Hindus are ineligible. The Circuit Court of Appeals held that since the United States had appeared in the State court of California, in which the naturalization took place, and objected to the naturalization on the ground of ineligibility and the judgment had gone against it in that court, it was estopped to litigate the same question in the cancellation suit. This decision

seemed to be squarely in conflict with the decision of this Court in *United States* v. *Ness, supra,* and accordingly the United States filed a petition for certiorari in the *Pandit case* to review the decision of the Circuit Court of Appeals on that point. The question of laches on the part of the Government in instituting cancellation suit was presented in the case, but it seems so clear that laches could not be asserted against the United States that the basis of the Government's petition and supporting brief was the decision of the Circuit Court of Appeals holding that the question of eligibility was *res judicata.* The petition for certiorari was denied. (273 U. S. 759.) We infer that the denial of the petition was for some reason other than agreement with the Circuit Court of Appeals on the question of *res judicata.* Some of the United States District Courts and Circuit Courts of Appeals have been entertaining suits under Section 15 to cancel naturalization certificates on grounds litigated by the United States in the naturalization proceeding, and other courts are applying the rule of *res judicata.* (*United States* v. *Ovens,* 13 F. (2d) 376; *United States* v. *Milder,* 284 Fed. 571; *United States* v. *Mulvey,* 232 Fed. 513; *United States* v. *Yeles,* 236 Fed. 784; *United States* v. *Srednik,* 19 F. (2d) 71; *United States* v. *Ali,* 20 F. (2d) 998.) Of course the attack on Pandit's naturalization was not on procedural grounds, but on the fundamental ground of ineligibility.

While we construe the decision in *Tutun* v. *United States*, 270 U. S. 568, as allowing appeal by the United States from an order of a United States District Court granting naturalization as well as an appeal by the petitioner from an order refusing naturalization, appeals in the State courts may only be taken where the State law permits it, as there is no Federal statute allowing appeal in naturalization cases in the State courts, even if Congress has power to provide for it. In many States no such appeals are allowed by State law. The decisions of *nisi prius* State courts in naturalization proceedings in which the United States appears would therefore be final, unless reviewable by this Court on certiorari under Section 237(b) of the Judicial Code, if the United States may not institute cancellation proceedings under Section 15.

The correct rule probably is that although, as held in *Tutun* v. *United States*, naturalization proceedings are judicial proceedings, with all the attributes of such proceedings, and but for Section 15 all matters litigated and decided in naturalization proceedings in which the United States appears would be *res judicata*, Section 15 was intended to abrogate that rule in respect of cases within the scope of Section 15—that is, cases where the naturalization was obtained by fraud or otherwise "illegally procured"—so that the real question in this case, and in cases like it, is whether the ground

for cancellation is one contemplated by Section 15. If it is, then it would seem to follow that the plea of *res judicata* may not be sustained, because Section 15 contemplates it shall not be availed of.

Respectfully submitted.

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DECEMBER, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 27

ANNA MARIE MANEY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court appears at page 6 of the record.

The opinion of the Circuit Court of Appeals (R. 23) is reported in 21 F. (2d) 28.

JURISDICTION OF THIS COURT

The judgment to be reviewed was entered on June 16, 1927. (R. 32.) A petition for rehearing was filed and entertained but denied on September 22, 1927. (R. 34.) Petition for certiorari was filed December 6, 1927, and granted January 9,

1928 (R. 35), pursuant to the provisions of the Act of February 13, 1925.

The questions presented

The questions presented are:

1. Whether the requirement in the Naturalization Act that the certificate of arrival shall be filed with the petition and remain on file until the hearing is one which a naturalization court may dispense with in its discretion.

2. Whether the failure to file the certificate of arrival with the petition, and the action of the naturalization court in granting naturalization without compliance with that requirement, makes the naturalization "illegally procured" within the meaning of Section 15 of the Naturalization Act so as to support a suit for cancellation.

3. Whether, if a cancellation proceeding is within the scope of Section 15 and authorized by it, the fact that the United States, through its naturalization examiner, appeared in the naturalization proceeding and objected to the granting of naturalization on the same ground asserted in the cancellation suit renders the matter *res judicata* so as to defeat the cancellation proceedings.

STATUTES INVOLVED

Section 1 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596 (U. S. C. Title 8, Sec. 106), so far as pertinent, reads as follows:

> * * * That it shall be the duty of the said Bureau [of Immigration] to provide, for use

at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this Act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof.

Section 4, *idem* (U. S. C., *idem*, Secs. 372, 379, and 380), reads in part as follows:

That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

* * * * *

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified * * *.

* * * * *

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of * * * Labor, if the petitioner arrives in the United

States after the passage of this Act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Sections 5 and 6, *idem* (U. S. C., *idem*, Secs. 396 and 397), provide in part as follows:

SEC. 5. That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned.

SEC. 6. That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least

> ninety days have elapsed after filing and posting the notice of such petition * * *.

Section 11, *idem* (U. S. C., *idem*, Sec. 399), provides as follows:

> That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

Section 15, *idem* (U. S. C., *idem*, Sec. 405, reads in part as follows:

> That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition

of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

* * * * *

Section 27, *idem* (U. S. C., *idem*, Sec. 409), provides in part as follows:

That substantially the following forms shall be used in the proceedings to which they relate:

* * * * *

In the matter of the petition of ——— to be admitted as a citizen of the United States of America.

To the ——— Court:

The petition of ——— ——— respectfully shows:

* * * * *

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of * * * Labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated ———.

(Signature of petitioner) ———.

——— ———, *ss:*

———— ———, being duly sworn, deposes and says that he is the petitioner in the

above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this ——— day of ———, anno Domini ———.

(L. S.)

———,

Clerk of the ——— Court.

PERTINENT REGULATIONS

Rule 5 of the September 24, 1920, edition of the Regulations of the Secretary of Labor provides, in part, as follows:

* * * The clerk of the court should not commence the execution of the petition until he has received the certificate of arrival prescribed by this regulation.

* * * * *

When a clerk of court executes a petition for naturalization for an alien who arrived in the United States before June 29, 1906, and fails to attach his declaration of intention, or, in the case of an alien who arrived after June 29, 1906, fails to attach thereto either his certificate of arrival or his declaration of intention, in accordance with the terms of section 4 of the act of June 29, 1906, no valid petition is docketed, and since the petitioner is only required to pay for the docketing of a complete petition, the petition should be marked "spoiled" and the fee held

> for the payment for a complete petition.
> * * *

Rule 5, Subdivision B, par. 1, of the June 15, 1924, edition, *idem*, reads as follows:

> No petition for naturalization of an alien who arrived in the United States subsequent to June 29, 1906, shall be accepted or filed by the clerk of a court having naturalization jurisdiction, unless there is attached to and made part of such petition a "Certificate of arrival" (Form 145 or Form 526) properly executed and showing the time, place, and manner of alien's arrival in the United States.

STATEMENT

This is a suit instituted by the United States June 24, 1925, in the United States District Court for the Eastern District of Wisconsin under Section 15 of the Naturalization Act, to cancel a certificate of naturalization granted to this petitioner on February 11, 1924, in the same United States District Court. The petition for naturalization was filed November 13, 1923 (R. 4), but it was not accompanied by the certificate of arrival, as required by Section 4 of the Naturalization Act. The certificate was not in fact filed with the Clerk of the United States District Court until December 3, 1923. (R. 2.) The opinion of the trial court states that twenty days after the petition for naturalization was filed, and on December 3, 1923, the certificate of arrival was mailed to the clerk by the district director of

naturalization. (R. 7.) The affidavit attached to the petition for cancellation in this case states that the certificate of arrival was not issued until November 24, 1923. (R. 4.) The clerk of the naturalization court must have executed the petition by filing and posting the notice and taking other steps provided by law before the certificate of arrival was filed, because the final hearing appears to have occurred on February 11, 1924, less than ninety days after December 3, 1923, and Section 6 of the Act (U. S. C., Title 8, Sec. 396) provides that no final action shall be had until at least ninety days have elapsed after filing and posting the notice of the petition. When the petition for naturalization came on for hearing, a naturalization examiner, on behalf of the United States, appeared and objected to the granting of the petition, not only because the certificate of arrival was not attached to and made a part of the petition when filed, but "because the said certificate of arrival was not filed with" the petition. (R. 5.)

The trial court, apparently recognizing the binding effect of the statutory requirement as to the time when the certificate of arrival must be filed, undertook to cure the failure to file it in time by a *nunc pro tunc* order (R. 5), and naturalization was granted against the opposition of the United States. Thereafter the United States instituted this suit, under Section 15, to cancel the certificate, alleging not only that the certificate of arrival was not physically attached to the petition until February

11, 1924, but that "no such certificate was filed with the Clerk of said Court until the 3rd of December, 1923." The affidavit attached to the petition in this case and made a part of it (R. 4) discloses that the question whether the failure to file the certificate in time operated to prevent naturalization was raised by the United States and decided in the naturalization proceeding. The answer of this petitioner also alleges that the point raised in the cancellation suit was raised and decided in the naturalization proceeding. (R. 6.)

The District Court held that the naturalization court had power to disregard the failure to file the certificate of arrival with the petition for naturalization and to accept the later filing as sufficient, and that it was sufficient that the certificate was before the court at the time naturalization was granted. The United States appealed, and the Circuit Court of Appeals held that the failure to file the certificate with the petition made the naturalization one "illegally procured" so as to support a suit to cancel under Section 15.

Summary of argument

I. Congress has specified the steps which must be taken to obtain naturalization. It has stated that an alien may be admitted "in the following manner and not otherwise." This law was enacted to correct abuses in the administration of the naturalization law, and this Court has said:

> No alien has the slightest right to naturalization unless all statutory requirements are complied with.

The requirement that a certificate of arrival shall be filed at the time the petition for naturalization is filed, and shall remain on file at least 90 days prior to the hearing, is a matter of substance. No court has power to dispense with it.

In *United States* v. *Ness*, 245 U. S. 319, this Court held that the failure to file such a certificate is a matter of substance which could not be dispensed with, and the failure justified cancellation proceedings under Section 15. The reasoning of that opinion shows that the requirement as to the time of filing the certificate of arrival is also a matter of substance. The object of requiring the filing of the certificate is not merely to furnish evidence to the court which may as well be presented at the hearing. The certificate of arrival is the starting point for the investigation of the applicant and of the posting of public notice of the application. Unless it is filed with the petition and remains on file the full period before the hearing, one purpose of requiring it is defeated.

Naturalization courts have not the power to dispense with any of the steps specified by Congress merely because they may believe in particular cases that the requirements may safely be dispensed with.

II. Naturalization is illegally procured within the meaning of Section 15, if it definitely appears

that any of the substantial requirements of the law have not been complied with.

In *United States* v. *Ness, supra,* it was held that naturalization was illegally procured within the meaning of Section 15 where the certificate of arrival was never filed. The failure to file at the time specified by the Act is also a matter of substance.

The overwhelming weight of authority in the lower courts is that naturalization is illegally procured if there be a failure to comply with any substantial requirement of the Act.

The rule announced by some Federal courts that, to be illegally procured, naturalization must be obtained by some "positive, affirmative act on the part of the procurer, and one of a sinister character" is not supported by anything in the statute and is directly opposed to the decisions in *United States* v. *Ginsberg,* 243 U. S. 472, and *United States* v. *Ness,* 245 U. S. 319.

III. If the case be one within the scope of Section 15, the fact that the United States appeared in the naturalization proceeding and opposed the naturalization on the ground asserted in the cancellation case, does not make the matter *res judicata.* Congress has not said that Section 15 may not be resorted to if the United States has appeared in the naturalization case. Section 11, authorizing appearance by the United States, is part of the same statute. If Congress had intended that Section 15

may not be resorted to where the United States has availed itself of Section 11 it would have so stated. The courts may not write such a qualification into Section 15. It has been held by this Court that Secton 15 gives a cumulative remedy. The point that *res judicata* is not available as a defense in a cancellation proceeding was squarely decided in *United States* v. *Ness*, 245 U. S. 319.

In *United States* v. *Ginsberg, supra*, the Court said:

> * * * every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in §14 and demand its cancellation unless issued in accordance with such requirements.

Although naturalization proceedings are judicial, as held in *Tutun* v. *United States*, 270 U. S. 568, Congress has power to provide that the defense of *res judicata* shall not be asserted in cancellation proceedings. That is in effect what it has done, and there is good reason for it. The remedy by appeal is not always complete. There is no right of appeal in some States from naturalization decrees in State courts. Naturalization proceedings are informal. The United States may not always have full opportunity to prepare, and it is represented by naturalization examiners. The records are often incomplete and the inquiry not thorough. Evidence to oppose naturalization is sometimes obtained only as a result of a naturalization hearing and at a later date. These are some rea-

sons why Congress intended that the United States in a cancellation proceeding could not be bound by the judgment in a naturalization case.

ARGUMENT

I

THE RULE OF STRICT AND NOT LIBERAL CONSTRUCTION IS TO BE APPLIED IN INTERPRETING THE NATURALIZATION ACT. THE REQUIREMENT THAT THE CERTIFICATE OF ARRIVAL SHALL BE FILED WITH THE PETITION IS ONE OF SUBSTANCE AND THE NATURALIZATION COURTS HAVE NO DISCRETION TO DISPENSE WITH IT

It was looseness in the administration of the previous naturalization laws that caused the enactment of the Act of 1906. That Act presents a clearly defined scheme for naturalization proceedings, and with precision outlines the steps which must be taken. So insistent was Congress that the requirement should be strictly followed that it provided that an alien "may be admitted to become a citizen of the United States in the following manner and not otherwise."

In speaking of the exactions of the statute in *United States* v. *Ginsberg*, 243 U. S. 472, 473, 474, 475, this Court said:

> Prior to 1906 "The Uniform Rule of Naturalization" authorized by the Constitution was found in the Act of 1802 and a few amendments thereto. This enumerated only general controlling principles. Grievous abuses having arisen, Congress undertook by the Act of June 29, 1906, c. 3592, 34 Stat. 596, to prescribe "and fix a uniform system

and a code of procedure in naturalization matters." Report Committee on Immigration and Naturalization, H. R. 1789, Feb. 26, 1906. This specifies with circumstantiality the manner ("and not otherwise") in which an alien may be admitted to become a citizen of the United States; what his preliminary declaration shall be; form and contents of his sworn petition to the court and witnesses by which it must be verified; form of oath to be taken in open court; necessary proof concerning residence, character, etc. The clerk is required to post notice of the petition with details concerning applicant, when final hearing will take place, names of witnesses by which alleged facts are to be established, etc. * * *

* * * * *

An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

* * * * *

No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements. * * *

Among the requirements of the Act is one that the certificate of arrival must be filed with and attached to the petition at the time of filing the petition. After this is done the clerk is required to give public notice of the application, and a hearing is deferred until at least 90 days after the filing and posting. In the case at bar the certificate of arrival was not filed with the petition. The petition was filed November 13, 1923, and the certificate of arrival was filed December 3, 1923. The clerk evidently proceeded to give public notice of the petition before the certificate was filed. The naturalization was granted on February 11, 1924, only 70 days after the filing of the certificate, although the statute contemplates 90 days between the filing of the complete statutory petition and final action by the court.

In *United States* v. *Ness*, 245 U. S. 319, proceedings were instituted under Section 15 to cancel a naturalization certificate because of failure to file the certificate of arrival. While in that case the certificate was never filed, and in the present case it was filed before the hearing, the reasoning of the Court supports the judgment in this case. The contention was urged there that the certificate of arrival "is merely a form of proof which the naturalization court has power to dispense with for cause." The Court said (pp. 322–324):

> * * * The uses served by the certificate, the history of the provision and its relation

to other parts of the act show that this contention is unsound.

Section 1 requires that a registry be made of certain facts concerning each alien arriving in the United States; and that "a certificate of such registry with the particulars thereof" be granted to each alien. Section 5 requires clerks of court to give public notice of each petition for naturalization filed. Section 6 prohibits courts from taking final action upon any petition until 90 days after such notice has been given. That period is provided so that the examiners of the Bureau of Naturalization and others may have opportunity for adequately investigating whether reasons exist for denial of the petition. The certificate of arrival is the natural starting point for this investigation. It aids in ascertaining (*a*) whether the petitioner was within any of the classes of aliens who are excluded from admission by sections 2 and 38 of the Immigration Act of February 20, 1907, 34 Stat. 898; (*b*) whether he is among those who are excluded from naturalization under section 7 of the Naturalization Act—for political beliefs or practices; (*c*) whether he is the same person whose declaration of intention to become a citizen is also attached to the petition under section 4, subdivision second; (*d*) whether the minimum period of five years' continuous residence prescribed by section 4, subdivision fourth, has been complied with. The certificate of arrival is in practice deemed so im-

portant that in the regulations issued by the Secretary of Labor under section 28 "for properly carrying into execution the various provisions" of the act, the clerk of court is advised that he "should not commence the execution of the petition until he has received the certificate of arrival."

Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. Section 4 declares: "That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." Section 27 declares: "That substantially the following forms shall be used in the proceedings to which they relate"; and the form of petition therein prescribed recites: "Attached hereto and made a part of this petition" is "the certificate from the Department of [Commerce and] Labor required by law." Experience and investigation had taught that the widespread frauds in naturalization, which led to the passage of the Act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of perjured testimony in cases of this character. A "uniform rule of naturalization" embodied in a simple and comprehensive code under federal supervision, was believed to be the only effective remedy for then existing abuses. And, in view of the large number of courts to which

> naturalization of aliens was entrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be adduced. The value of contemporary documentary evidence was recognized; and the certificate of arrival was, therefore, specifically included among the prerequisites to naturalization. * * *

The object in requiring the filing of the certificate of arrival is not merely to furnish evidence to the court. If that had been the object the Act no doubt would have directed it to be filed at or before the hearing. The certificate of arrival is the basis of the whole inquiry as to the qualifications of the applicant. Congress intended that it should be filed with the petition, should be on file when public notice of the petition was given, and should be available as a basis for inquiry, either by the naturalization officials or by any citizen, during the full ninety-day period required to elapse between the filing and posting of the petition and the date of hearing.

The opinion in *United States* v. *Ness, supra,* makes it clear that the filing of the certificate with the petition and at the beginning of the proceeding was for a definite purpose.

If a naturalization court may allow the certificate to be filed after the petition is filed, it may grant naturalization where the certificate is not filed until the day of the hearing. If it may, in

its discretion, dispense with one requirement of the Act, it may dispense with others. It is not for a court to say in any particular case that such a requirement may be safely dispensed with. Naturalization courts should not be allowed the discretion to dispense with any of the substantial requirements of the Naturalization Act.

In the case of *In re Liberman*, 193 Fed. 301, on objection to the granting of naturalization because of failure to file the certificate with the petition, the court said ((p. 302):

> It is the opinion of the court that this objection must be sustained, and before the applicant can be admitted to citizenship it will be necessary for him to file a new petition, conforming to the requirements of the naturalization law of 1906. One of the provisions of the fourth section of that statute reads as follows:
>
> "At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition. 34 U. S. Stat., pt. 1, p. 597; U. S. Comp. St. Supp. 1907, p. 421; U. S. Comp. St. Supp. 1909, p. 479; F. S. A. Supp. 1909, p. 367; Pierce's Fed. Code, § 8295."

It appears by the petition filed by this applicant that his arrival in the United States was subsequent to the passage of this act, and the petition is deficient, because it lacks one of the prescribed essentials of a valid petition. The authority of courts to admit aliens to citizenship is conferred and limited by laws enacted by Congress, and all the provisions of law prescribing the procedure in the exercise of the authority are mandatory. The law requires every applicant for naturalization to file a petition with the clerk of a court authorized to act upon it. Until 90 days after the filing of such petition shall have elapsed, the court has no jurisdiction to admit him to citizenship. It is essential to the validity of a petition that it must be full and complete in the statement of facts which the law requires. It must be verified as the law prescribes, and there must be filed with it the applicant's preliminary declaration of intention; and if his immigration into the United States shall have been subsequent to June 29, 1906, there must also be filed the certificate from the Department of Commerce and Labor required by that part of the law above quoted. Said certificate and declaration must be filed at the time of filing the petition, and both must be attached to and made part of the petition. Congress, having taken the pains to prescribe these details, intended manifestly to impose conditions which the courts are not at liberty to ignore.

In *Ex Parte Eberhardt*, 270 Fed. 334, the petitioner filed with his petition a telegram "from Washington" to the effect that the certificate of arrival "was being sent forward by mail forthwith." This was held not to meet the statutory requirement of simultaneous filing, the court saying (pp. 335, 336):

> The requirements of law surrounding certificate of arrival matters were for a time very broadly construed. *In re Schmidt* (D. C.) 207 Fed. 678; *In re McPhee* (D. C.) 209 Fed. 143; *In re Pick* (D. C.) 209 Fed. 999; *In re Titone* (D. C.) 233 Fed. 175. But these cases have been deprived of any authority by the pronouncement of the Supreme Court of the United States in *United States* v. *Ness*, 245 U. S. 322. • • •
>
> • • • • •
>
> It is particularly to be noted that "at the time of filing his petition there shall be filed with the clerk of court," by the petitioner, the certificate of arrival called for by the statute. The same provision of law requires the candidate to make a part of his application, in the same manner, his declaration of intention. Where a valid declaration of intention is not attached to such a petition at the time of its filing, that fact renders the application void. *United States* v. *Moreno*, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359. And the same rule prevails, as we have seen in the Ness Case, supra, where at the time of the execution of the petition, the same was not supported by a valid certificate of arrival. The fact that such a certificate was

in existence, on the date petition was executed, and that the same was being mailed to St. Louis from Washington, does not in any manner alter the situation. The statute is specific in its requirement that at the time of the execution of the petition the certificate of arrival needed must be in the hands of the clerk of the court, who is required to make the same an integral part thereof. A later attaching of such a certificate of arrival to a given petition does not meet the requirements of the law. Such petition is a nullity. It is not voidable, but is void. In the language of the *United States* v. *Martorana*, 171 Fed. 398, 96 C. C. A. 354, such a petition can not be validated by any subsequent process, "as in point of law there is nothing to amend by, and nothing to amend." In other words, no petition has in contemplation of law actually been executed. The court, in such a case, is without jurisdiction, as there is nothing legally before it that it can entertain.

* * * * *

Aliens have no right, inherent or statutory, to be admitted to membership in the body politic of the United States of America. Naturalization, then, being solely and entirely a political privilege extended by sovereign grace to aliens resident within the United States, Congress has undoubted authority under the Constitution to prescribe the terms and conditions upon which such privilege shall be granted. *In re Spitzer* (D. C.) 160 Fed. 138; *In re Buntaro* (D. C.)

163 Fed. 922; *In re Knight* (D. C.) 171 Fed. 301; *United States* v. *Spohrer* (C. C.) 175 Fed. 442; *Johannessen* v. *United States*, 225 U. S. 240, 32 Sup. Ct. 613, 56 L. Ed. 1066; *United States* v. *Ginsberg*, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853; *United States* v. *Gulliksen*, 244 Fed. 727, 157 C. C. A. 175. The terms and conditions specified and prescribed by Congress respecting the grant to aliens of the favor or privilege of naturalization as citizens of the United States of America must be strictly construed and enforced, and aliens are bound to strictly meet and conform to these terms and conditions upon which alone the right they seek can be conferred. *Spitzer, Knight, Spohrer, Johannessen, Ginsberg,* and *Gulliksen Cases, supra; United States* v. *Nisbet* (D. C.) 168 Fed. 1006; *United States* v. *Martorana*, 171 Fed. 398, 96 C. C. A. 353; *United States* v. *Cohen*, 179 Fed. 835, 103 C. C. A. 28, 29 L. R. A. (N. S.) 829; *United States* v. *Peterson*, 182 Fed. 291, 104 C. C. A. 571; *United States* v. *Rodgers*, 185 Fed. 334, 107 C. C. A. 452; *United States* v. *Kolodner*, 204 Fed. 244, 124 C. C. A. 1; *In re Hollo* (D. C.) 206 Fed. 854; *United States* v. *Mueller*, 246 Fed. 679, 158 C. C. A. 635; and *United States* v. *Vogel* (C. C. A.) 262 Fed. 262.

It is made the duty by law of the Commissioner of Immigration at the port of entry to make such record of the arrival of each and every alien as will later permit such official to prepare from the official records of his office a certificate of arrival for use in naturaliza-

> tion purposes. Nothing short of a certificate prepared by such official, in the manner prescribed, will meet the requirements of the statute. A petition for naturalization, that was not at the time of its execution supported by a certificate of arrival fully meeting the terms of the act, is a mere nullity, and must be denied. * * *

To the same effect are—

> *In re Olsen*, 18 F. (2d) 425, 426.
> *In re Hollo*, 206 Fed. 852, 854.

Other instances of statutory requirements regarded as mandatory are the requirement of hearing in open court (*United States* v. *Ginsberg*, 243 U. S. 472); the requirement that witnesses be examined under oath by the court, such requirement not being satisfied by the introduction of depositions (*United States* v. *Leles*, 236 Fed. 784); the requirement of Section 11 as to the right of the United States to call witnesses (*United States* v. *Milder*, 284 Fed. 571, 572); the requirement that the petition be verified by two witnesses who are citizens of the United States, which is violated if one of such witnesses is an alien, so that the court may not permit, by amendment, the substitution of a new witness (*United States* v. *Martorana*, 171 Fed. 397); the requirement that the alien in his declaration shall renounce allegiance by name to the State or sovereignty of which he may be a citizen or subject, which is not satisfied by general renunciation (*Ex parte Lange*, 197 Fed. 769). In

holding *In re Friedl*, 202 Fed. 300, that a naturalization court is without power to permit amendment of declaration of intention, the court said (p. 302):

> The hardship resulting to the petitioner can not be relieved against merely because it may appear that the error is clerical, and not his own. If the power to amend is to be recognized at all, its exercise may well be invoked in every case where facts are presented disclosing reasonable excuse or meritorious grounds for the exercise of a discretion.

II

THE FAILURE TO FILE THE CERTIFICATE OF ARRIVAL WITH THE PETITION MAKES THE NATURALIZATION ONE ILLEGALLY PROCURED WITHIN THE MEANING OF SECTION 15, AUTHORIZING CANCELLATION PROCEEDINGS

It appearing that the naturalization court had no authority to dispense with the statutory requirement that the certificate of arrival shall be filed simultaneously with the filing of the petition, the next question is whether such a naturalization was illegally procured within the meaning of Section 15 of the Naturalization Act.

Federal courts have generally held that the words "illegally procured" mean "contrary to the provisions of the law," that is, procured without compliance with all statutory requirements. (*United States* v. *Ginsberg*, 243 U. S. 472; *United States* v. *Mulvey*, 232 Fed. 513, 519; *United States* v. *Koopmans*, 290 Fed. 545, 546; *United States* v. *Albertini*, 206 Fed. 133; *United States* v. *Shanahan*, 232 Fed. 169.)

In *United States* v. *Ness, supra,* the complete failure to file the certificate was held to make the naturalization one illegally procured within the meaning of Section 15. If the requirement that the certificate be filed with the petition is a matter of substance, as we have contended above, then the failure to comply with that requirement renders the naturalization one illegally procured as much as the entire failure to file it in the *Ness* case. There is nothing in the *Ness* case to suggest a distinction.

In *United States* v. *Koopmans,* 290 Fed. 545, 546, the words "illegally procured" are thus defined:

> The question of what is meant by "illegally obtained" has been discussed with great frequency, and is treated in all of the cases hereinbefore cited, and the weight of authority seems to be that "illegally" means contrary to the provisions of the law.

It may be that some errors which a naturalization court may commit may be reviewed by appeal, but not in cancellation proceedings under Section 15, and it has been said that mere irregularities in procedure do not make a case for cancellation of a certificate as illegally procured. Rulings as to the competency or weight of evidence, or credibility of witnesses, are also said to be not reviewable in proceedings under Section 15. *United States* v. *Milder,* 284 Fed. 571; *United States* v. *Shanahan,* 232 Fed. 169. Just where the line may be drawn need not be considered here. It should be held, at least, since Congress has provided that cer-

tain steps must be taken and has said expressly that naturalization should be granted after compliance with them, and not otherwise, that a naturalization is illegally procured where it definitely and clearly appears that some one of the substantial requirements of the Act have not been complied with. Certainly the phrase "illegally procured" is not limited in its application to cases where the applicant was ineligible. There is nothing in the Act to support the claim that the words "illegally procured" refer only to cases where the defect in the proceedings is "jurisdictional" in the ordinary sense, and authorities on the point that a judgment may only be set aside in an independent proceeding when void for want of jurisdiction are beside the mark.

The decisions of this Court support the contention that failure to comply with any of the substantial requirements of the Naturalization Act makes the naturalization one illegally procured within the meaning of Section 15. The Third Circuit has invented the rule that the words "illegally procured" mean "a positive, affirmative act on the part of the procurer, and one of a sinister character," and that the words cover a case "not an error of law, but subornation, or some other illegal means, to impose on the court." *United States* v. *Richmond*, 17 F. (2d) 28; *United States* v. *Srednik*, 19 F. (2d) 71. There is no support in the statute for such a rule, and it is directly in conflict with the decision of this Court in *United States* v. *Ness*,

supra, as it could hardly be said that the failure to file the certificate of arrival, as in that case, was some positive affirmative act of a sinister character committed by the applicant, in the nature of an imposition on the court.

Congress has not attempted to provide for appeals from naturalization decrees entered in State courts. In at least three States the State courts have held that the State laws do not provide for such appeals. If the right to assail naturalization certificates by proceedings under Section 15 is denied in cases where there has been a disregard of requirements of law by such State courts, the United States would have no remedy, unless through petition for certiorari to this Court under Sec. 237 (b) of the Judicial Code, and we shrink from adding to the number of those. Cases in the District Courts of the United States and in the United States Circuit Courts of Appeals as to what constitutes illegal procurement are collected in a note in United States Code Annotated, Title 8, Section 405, page 466.

III

IF A CANCELLATION PROCEEDING IS WITHIN THE SCOPE OF SECTION 15, THE DEFENSE OF RES JUDICATA IS NOT AVAILABLE AGAINST THE UNITED STATES BECAUSE OF ITS APPEARANCE IN THE NATURALIZATION CASE

Congress has not said that Section 15 may not be resorted to if the United States has appeared in the naturalization case and objected to the naturali-

zation on the ground asserted in the cancellation proceedings.

Section 11, authorizing appearances by the United States in naturalization cases is a part of the statute which contains Section 15. If Congress had intended that Section 15 may not be resorted to where the United States has availed itself of the right granted in Section 11 it would have so said The courts may not write such a qualification into Section 15. In *United States* v. *Ness, supra*, it was said:

> But in our opinion Section 11 and Section 15 were designed to afford cumulative protection against fraudulent or illegal naturalization.

In that case, where the cancellation proceedings were based on the failure to file the certificate of arrival, the defense of *res judicata* was interposed because of the appearance of the United States in the naturalization proceeding and its opposition to naturalization on the ground that the certificate of arrival was not filed, and this Court held that the plea of *res judicata* in the cancellation case could not be sustained. The point seems to have been squarely decided in that case.

In *Johannessen* v. *United States*, 225 U. S. 227, the point was mentioned but not decided.

In *United States* v. *Pandit*, 15 F. (2d) 285, the United States sought cancellation under Section 15 of a certificate granted to a Hindu. The Circuit Court of Appeals for the Ninth Circuit held in that

case that the appearance of the United States in the naturalization proceeding and its objection there to the naturalization on the ground of the applicant's race made the matter *res judicata*. Nowhere in the opinion in that case is the decision of this Court to the contrary in *United States* v. *Ness*, *supra*, referred to. The United States sought review of the Pandit decision on writ of certiorari, but its petition was denied. (273 U. S. 759.) There were circumstances in that case which may have induced the Court to exercise its discretion against the petition for the writ, but there is no occasion to speculate on that.

In *United States* v. *Carver*, 260 U. S. 482, 490, it was said:

> * * * The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times.

The United States Circuit Courts of Appeals for the Fourth, Eighth, and Second Circuits have held that matters litigated in naturalization proceedings are not *res judicata* in cancellation suits. *United States* v. *Ovens*, 13 F. (2d) 376; *United States* v. *Milder*, 284 Fed. 571; *United States* v. *Mulvey*, 232 Fed. 513. See also *United States* v. *Leles*, 236 Fed. 784 (D. C. Calif.); *United States* v. *Ali*, 20 F. (2d) 998 (D. C. Mich.).

The Court for the Second Circuit reiterated its conclusion in *Gokhale* v. *United States*, 26 F. (2d)

360, in a suit, as in the *Pandit* case, to cancel the certificate of a Hindu. The *Gokhale* case is pending here on petition for certiorari. (No. 361, October Term, 1928.)

In *Tutun* v. *United States*, 270 U. S. 568, it has been held that a naturalization proceeding is a judicial proceeding, and that there is a right of appeal by the applicant in the Federal courts, and the petitioner argues that therefore the doctrine of *res judicata*, which is common to judgments in judicial proceedings, is applicable here. We assume that the United States also has the right of appeal in naturalization cases in the Federal courts. Congress has power to provide that in a cancellation proceeding the United States may litigate the question whether naturalization was illegally procured, notwithstanding it may have appeared in the naturalization case and interposed an objection on the same ground, and it has so provided, in effect, when it authorized cancellation proceedings under Section 15 without regard to whether an appearance had been made in the naturalization case. The real question is whether the ground for attack on the certificate is within the scope of Section 15 and whether the naturalization is one illegally procured within the meaning of Section 15. If it is a case of illegal procurement, then Section 15 provides a method of reviewing the action of the naturalization court, notwithstanding the point may have been there litigated.

In *United States* v. *Ginsberg, supra*, it was said:

> * * * every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in § 15 and demand its cancellation unless issued in accordance with such requirements.

In *United States* v. *Ness, supra*, the naturalization had been granted in a State court, and attention is called to that fact in the opinion in *Tutun* v. *United States*, 270 U. S. 568, 580, but it can make no difference on the question as to *res judicata* whether the naturalization took place in a Federal court or a State court, or whether there is a right of appeal from a naturalization judgment as in the Federal courts and in some State courts, or whether the naturalization took place in a State court of Montana, California, or Washington, where the State courts have held that there is no right of appeal.

> *State ex rel Weisz* v. *District Court*, 61 Montana, 427.
>
> *In re Wilkie*, 58 Cal. App. 22.
>
> State *ex rel Gorelick* v. *Superior Court*, 75 Wash. 239.

Congress has not provided that if a right of appeal exists proceedings may not be had under Section 15 where the question has been raised in the naturalization case, and this Court has said the remedies by appeal (where that right exists) and under Section 15 are cumulative.

In *United States* v. *Owens*, 13 F. (2d) 376, 377, the *Tutun* decision was interpreted as follows:

> * * * In view of *Tutun* v. *United States*, 46 S. Ct. 425, 70 L. Ed. —, decided by the Supreme Court April 12, 1926, it is possible that the United States might have appealed from the order naturalizing him, in spite of the intimation or statement to the contrary in *United States* v. *Ness*, *supra*; and, of course, it is now certain that the appellee could have done so, had the lower court refused to admit him to citizenship. *Tutun* v. *United States*, *supra*; section 638, Consolidated Statutes of North Carolina 1919.
>
> It is well settled, however, that, when an order for naturalization has been illegally procured, the United States may, without appealing from it, file an independent bill in equity for the cancellation of the certificate.

In that case naturalization granted on a petition filed three months after the expiration of the seven years from the date of the declaration was held to have been illegally procured.

CONCLUSION

The requirement that the certificate of arrival shall be filed with the petition for naturalization is one of substance, which the courts have no discretion to dispense with. The naturalization was illegally procured within the meaning of Section 15 because granted without compliance with a substantial requirement prescribed by Congress, and

Section 15 contemplates that the question of illegal procurement may be there litigated, notwithstanding the same point may have been made by the United States in the naturalization proceeding.

It is respectfully submitted that the judgment should be affirmed.

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OCTOBER, 1928.

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